IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 294

CITY BANK FARMERS TRUST COMPANY, formerly known as The Farmers Loan and Trust Company, as Administrator of the goods, chattels and credits of HELEN HALL VAIL, deceased,

Petitioner,

against

GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-Eighth Collection District, New York.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX

	PAGE
Jurisdiction	1
Opinions Below	2
Statutes and Regulations Involved	2
Question Presented	2
Statement of the Case	2
Reasons for Granting the Writ	6
Brief and Argument	7
1. The Circuit Court of Appeals, one member of the Court dissenting, has decided an important question of law in a way probably in conflict with applicable local decisions	7
2. The Circuit Court of Appeals, one member of the Court dissenting, has decided a Federal question, probably in conflict with applicable decisions of this Court	12
3. The Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, decided by this Court	15
Conclusion	18
Certiorari Should Be Granted	18
Appendix—Statutes and Regulations Involved	19

Authorities

Cases

Burnet v. Guggenheim, 288 U. S. 280 (1933) 13

City Bank Farmers Trust Co. v. Hoey, 23 Fed. Supp. 831 (S. D. N. Y. 1938; aff'd. 101 F. (2d) 9) 14, 15

Colorado National Bank, et al. v. Commissioner, 305 U. S. 23 (1938) 12, 13

Commissioner v. Greene, 119 F. (2d) 383 (C. C. A. 9th, 1941; cert. den. 314 U. S. 641) 14, 15

Crooks, Collector v. Harrelson, 282 U. S. 55 (1930) .. 13

Estate of Sanford v. Commissioner, 308 U. S. 39 .... 13, 14

Ex Parte Whitbread, 2 Mer. 99; 35 Eng. Rep. 878 (1816) 8, 10

Farwell v. Commissioner, 38 F. (2d) 791 (C. C. A. 2nd 1930) 15

Gould v. Gould, 245 U. S. 151 (1917) 13

Heiner v. Donnan, 285 U. S. 312 (1932) 12, 17

Helvering v. City Bank Co., 296 U. S. 85 (1935) 17

Helvering v. Stuart, 317 U. S. 154 (1942) 11

Hesslein v. Hoey, 91 F. (2d) 954 (C. C. A. 2nd, 1937; cert. den. 302 U. S. 756) 13

Hoeper v. Tax Commission, 284 U. S. 206 (1931) 17

In Re Andrews, 192 N. Y. 514 (1908) 8

Lewis v. Jones, 50 Barb. 645 (1868) 7, 10

Matter of Blewitt, 131 N. Y. 541 (1892) 8

Matter of Flagler, 248 N. Y. 415 (1925) 7, 8

Matter of Heeney, 2 Barb. Ch. 326 (1847) 8

Matter of Willoughby, 11 Paige 257 (1844) 8

Milliken v. United States, 283 U. S. 15 (1931) 12, 15

Nichols v. Coolidge, 274 U. S. 531 (1927) 17

Parsee Merchant's Case, 11 Abb. Prac. N. S. 209 (1871) 8

Rasquin v. Humphreys, 308 U. S. 54 (1939) 14

Sporza v. German Savings Bank, 192 N. Y. 8 (1908) 8

United States v. Wells, 283 U. S. 102 (1931) 12, 15

STATUTES

PAGE

Judicial Code (As amended by the Act of February 13, 1925), Section 240 (a) 1

Revenue Act of 1926, Sec. 302 (c); now Sec. 811 (c) of Internal Revenue Code 2, 15, 16, 19

Revenue Act of 1932
- Sec. 501 14
- Sec. 503 14

New York Civil Practice Act
- Sec. 1356 ..... 8, 23
- Sec. 1357 ..... 10, 23
- Sec. 1382 ..... 10, 23
- Sec. 1383 ..... 10, 23

REGULATIONS

Treasury Department Regulations 80 (approved Nov. 7, 1934) 19

TREATISE

Pomeroy, Equity Jurisprudence, Vol. i, 4th Ed. (1918) 8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on May 27, 1944, which judgment affirmed the judgment of the District Court of the United States for the Western District of New York, entered May 14, 1943.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Opinions Below

The opinion of the District Judge upon the trial of the case is printed at pages 387-400 of the Record and is reported in 43 Fed. Supp. 790.

The opinion of the Circuit Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Western District of New York, entered May 14, 1943 (R. 416), was handed down May 10, 1944, is printed at pages 436-444 of the Record and is reported in 142 F. (2d) 599.

Statutes and Regulations Involved

The pertinent statutes and regulations are printed in the Appendix, *infra*.

Question Presented

Whether allowances which were paid out of surplus income of an incompetent person, adjudged incapable of managing her person and affairs, by the Committee of her property, pursuant to orders of the New York Supreme Court, over a period of approximately nine years preceding her death, to various members of her family and comprising approximately 200 quarterly payments of allowance moneys for the benefit of these persons, were transfers made *by the decedent in contemplation of death* and, therefore, part of decedent's estate taxable under the Federal Estate Tax Law (Revenue Act of 1926, Sec. 302 (c), as amended; now Sec. 811 (c) of Internal Revenue Code).

Statement of the Case

This action was instituted in the District Court for the Western District of New York by the Administrator of the Estate of Helen Hall Vail for a refund of estate taxes alleged to have been illegally and erroneously assessed and

collected upon a deficiency assessment (R. 2-12). The question involved is that hereinbefore stated.

In 1926, the decedent, in a proceeding in the Supreme Court of the State of New York, was found to be incompetent (R. 78) and a Committee of the Property of the incompetent was appointed (R. 83). The incompetent lived until December 27, 1935 (R. 74), a period of some nine years; at no time did she recover her sanity.

The incompetent was a very wealthy woman. For the four or five years preceding the declaration of her mental incompetency her income had averaged over $300,000 per year (R. 171-172). Prior to her incompetency she had lived in great luxury (R. 149-150; 230-232) which she shared with her daughters (R. 226-227; 241-243; 305-306). In addition she had been in the habit over many years prior to her incompetency of making outright gifts to her children in substantial amounts (R. 134-135; 166; 169; 278).

In October, 1926, after Mrs. Vail had been declared incompetent, her daughter applied to the Supreme Court of the State of New York for an order directing the Committee of the Property to pay to the persons named in the petition annual allowances from the income of the incompetent to the extent that the Court might find such allowances would have been made by the incompetent had she been competent and mentally normal (Pl. Ex. 9, R. 54; 96-101), and not needed for the care and maintenance of the incompetent.

Hearings were held before a Referee (Pl. Ex. 14, R. 56; 106-160) and on the basis of the testimony and the findings of the Referee (Pl. Ex. 15, R. 56; 161-169) Hon. Richard P. Lydon, a Justice of the Supreme Court of the State of New York, entered an order (Pl. Ex. 16, R. 56; 170-174) which, among other things, found that to maintain and support the incompetent and care for her properly there could not reasonably be expended more than $50,000. a year and "that if the said incompetent Helen Hall Vail, were in the possession of her mental faculties and in all respects competent, she would desire the allowances hereinafter fixed to

be made to the persons hereinafter designated" (R. 172) and ordered the following annual allowances to be made to the following relatives of the incompetent from the income of the incompetent:

MaBelle Houghton Plumb, a daughter	$50,000.
Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren	$50,000.
Edward Hageman Hall, a brother	$ 2,000.
Mary Hall Taft, a sister	$ 3,000.
Elizabeth Hall Burdick, a sister	$ 2,000.
Abbe Ferrin, a sister	$ 2,000.
Lucy H. Ferris, a sister	$ 2,000.

(R. 172-173).

In 1932, after a further hearing in the Supreme Court of the State of New York (Pl. Ex. 26, R. 59; 191-270), the aforesaid allowances to the daughter and to the General Guardian of the three minor grandchildren of the incompetent were increased to the extent of $25,000 per annum, payable quarterly out of surplus income. This order further directed that these increased allowances be made retroactive to the extent of five and one-quarter years and paid out of the surplus income of the incompetent (Pl. Ex. 30, R. 60; 285-293).

The order of the State Court, dated June 3, 1932, contained findings that accumulated income in the hands of the Committee amounted to a sum in excess of $1,000,000, that the income of the incompetent for a period of five and one-half years prior thereto had averaged about $395,000 a year and the surplus income, after paying all expenses, including allowances theretofore granted by the order of the State Court of January 14, 1927, and paying all expenses on account of the incompetent for care and maintenance, had averaged about $191,000 per annum, and that if the incompetent had been in possession of her mental faculties and in all respects competent, she would have desired that the allowances fixed by said order of June 3,

1932 be made and would have made such annual allowances out of her income (R. 286-287).

In no instance was the principal of the incompetent's estate to be expended under any of these orders; and the annual allowances made to her relatives by these orders were payable only out of the income of the incompetent's estate to the extent that it was not used for her maintenance and support.

Over a period of approximately nine years the Committee of the Property, acting in pursuance of the orders of the Supreme Court of the State of New York, paid out of the incompetent's surplus income to the persons named in the orders, allowances which aggregated the sum of $1,377,886.67 (R. 26-34). There were in all approximately 200 quarterly payments of allowances to nine different individuals extending over a period of nearly nine years (R. 26-34). The Federal Gift Tax was paid on all amounts subject thereto paid after its effective date.

The aggregate of the payments made pursuant to orders of the State Court was included by the Commissioner in the incompetent's estate for Estate Tax purposes on the ground that the payments were made in contemplation of death. The tax thereon was paid and the Administrator in this action sued for a refund of that tax (R. 2-12).

The case was tried by the District Court, without a jury, which granted judgment in favor of the plaintiff to the extent of $54,100.24 and for the defendant as to the remainder of the amount sued for (R. 416-417) on the ground that it found that the allowances to the extent of $6,000. per annum to each branch of the family and of $500. paid annually to a sister of the incompetent were not made in contemplation of death but that the same allowances to the extent that they exceeded those amounts were made in contemplation of death and in "anticipation of the succession to the estate of the incompetent". This decision of the District Court was affirmed by the Circuit Court of Appeals for the Second Circuit, with Swan, J., dissenting (R. 436-444).

Reasons for Granting the Writ

1. The Circuit Court of Appeals, one member of the Court dissenting, has decided an important question of law in a way probably in conflict with applicable local decisions.

2. The Circuit Court of Appeals, one member of the Court dissenting, has decided a Federal question, probably in conflict with applicable decisions of this Court.

3. The Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, decided by this Court.

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BRIEF AND ARGUMENT

I.

The Circuit Court of Appeals, one member of the Court dissenting, has decided an important question of law in a way probably in conflict with applicable local decisions.

The Supreme Court of the State of New York authorized the payment of allowances out of the surplus income of the incompetent in the exercise of statutory and chancery powers upon the theory that the incompetent would in all probability have made such payments if she had been of sound mind. Upon no other theory could the allowances be justified.

Matter of Flagler, 248 N. Y. 415 (1925).

There is a clearly defined limitation upon the jurisdiction or power of the New York Supreme Court in granting allowances out of incompetent persons' estates. The Court cannot make, authorize or direct a distribution of an incompetent's property, which is testamentary in character. No such power is conferred by statute, either expressly or by implication, and the rules laid down in the decisions of the New York Courts and the English Courts of Chancery expressly deny the existence of any such power.

Lewis v. *Jones*, 50 Barb. 645 (1868).

It is, however, a normal and well-established practice of the New York Supreme Court sitting in equity to direct allowances out of the surplus income of an incompetent person's estate, such as are involved in this case. It is a function which has been exercised by courts of equity since the early days of the English Chancery Courts. The practice has been carried on by the courts of New York from their earliest days down to the present time. The jurisdic-

tion of the New York Supreme Court in this field is conferred by statute (Sec. 1356 of the New York Civil Practice Act, printed in Appendix, *infra*) but its powers are exercised according to the well-established rules and practice of the Chancery Courts in lunacy cases—both in New York courts of equity and the English courts of chancery.

Pomeroy, Equity Jurisprudence, Vol. 1, 4th Ed. (1918), Sec. 385-n;
Matter of Blewitt, 131 N. Y. 541, 546 (1892);
Sporza v. *German Savings Bank*, 192 N. Y. 8 (1908);
In Re Andrews, 192 N. Y. 514 (1908);
Matter of Flagler, supra;
Parsee Merchant's Case, 11 Abb. Prac. N. S. 209, 219 (1871);
Ex Parte Whitbread, 2 Mer. 99; 35 Eng. Rep. 878 (1816);
Matter of Willoughby, 11 Paige 257 (1844);
Matter of Heeney, 2 Barb. Ch. 326 (1847).

In the State of New York, the leading case is *Matter of Flagler (supra)*, decided by its Court of Appeals. At p. 418 the Court stated in an opinion by Lehman, J.:

> "If Mrs. Flagler to-day could decide upon the disposition of the income of her great estate, moral or charitable considerations would dictate her decision only to the extent that she felt their force. Her great affluence might impel her to relieve the distress of her cousin; the law would not compel her to do so if she decided otherwise. The power of the court to dispose of her income is not plenary. The court may not be moved by its own generous impulses in the disposition of the income of the incompetent. *In reaching decision it may give to moral or charitable considerations only such weight as it finds that the incompetent herself would have given to them.* Allowances for the support of collateral relatives of the incompetent have been made 'upon the theory that the lunatic would, in all probability, have made such payments if he had been

of sound mind'. (*Matter of Lord*, 227 N. Y. 145.) The Appellate Division correctly held that the allowance made at Special Term may be justified upon no other theory. *Upon an examination of the record we find that the evidence leads logically to the conclusion that Mrs. Flagler, if sane, would to-day provide some relief for the petitioner.*" (Italics ours).

The Circuit Court of Appeals, however, has misapprehended and misapplied the law of the State of New York and held that:

"* * * the intent of the court must control in deciding whether the payments were made 'in contemplation of death' for obviously the incompetent herself could have no intent of any kind. *The judges' intent was to make such gifts* as the incompetent would have made, if she had been competent, so the orders said; but that cannot have meant such gifts as she would have made, had she been not only competent, but expecting to continue competent until she died. *It must have meant such gifts as she would have made, if for the moment lucid, but with the prospect of imminent incompetency before her.*" (R. 438) (Italics ours).

This theory ignores "*contemplation of death*" except as it may exist in the minds of the judges who made these orders and is wholly in conflict with the decisions of the New York Court of Appeals (*supra*), in that it substitutes the "*generous impulses*" of the Court for those which may be attributed to the incompetent upon "*an examination of the record*".

The result reached by the Circuit Court of Appeals is in obvious conflict with the New York decisions, because on the "lucid interval plus imminent insanity" theory which it formulated, and which Judge Swan in his dissenting opinion characterized as the veriest fiction (R. 443), the New York Courts would be free to give away all an incompetent's property, save perhaps what might be required for his maintenance and support. This is not the law of New York.

The New York courts have no power to make any allowances out of the income of an incompetent on the theory that he is permanently insane. The property of such a person must be managed on the assumption that he may recover sanity. This is the whole purpose of the conservation machinery set up by the law of New York.

As Lord Eldon said in *Ex parte Whitbread, supra*, at page 102:

> "Nevertheless, the Court in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin.
>
> * * * * *
>
> But the Court does not do this because, if the lunatic were to die tomorrow, they would be entitled to the entire distribution of his estate, or necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic.
>
> * * * * *
>
> * * * and if we get to the principle, we find that it is not because the parties are next of kin of the lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done."

The *Whitbread* case has been frequently cited with approval and followed by the New York courts.

Neither has the New York Supreme Court power to make a will for an incompetent person and it has nothing to do with the disposition of his property at or after his death.

> *The New York Civil Practice Act*, Sections 1357, 1382 and 1383 (printed in Appendix, *infra*).

As was stated by the New York Supreme Court in *Lewis v. Jones*, 50 Barb. 645 (1868), at page 649:

> "The commission, certainly, does not authorize the committee to make a will for his ward; or to dictate to him the terms of it; nor does it vest such power in

> the court. That remains in the lunatic, or inebriate, or else it is suspended or extinguished."

And, again, at page 662:

> "The court has the charge and control of the estate, only during the continuance of the commission; and by the appointment of the committee, it commits the exercise of most of its power to him. But the right of either to control and care for the estate and person of the ward, are for his benefit; and there is nothing in the objects for which the court is vested with its authority over the estate, to sanction the idea that either the court or committee have anything to do with its disposition after his death."

In the absence of any finding by the Circuit Court of Appeals or the District Court below, that the New York Supreme Court exceeded its jurisdiction or abused its discretion in granting these allowances (and there was no such finding), it must be assumed that under the New York law as above set forth the New York Court did not grant the allowances as transfers of a testamentary nature and that they were, therefore, not made in contemplation of death. As Judge Swan points out in his dissent—

> "The state court which directed the payments to be made did not purport to make transfers in contemplation of death and had no legal power to do so. It cannot make testamentary dispositions for the incompetent, N. Y. Civ. Prac. Act, § 1383; * * *" (R. 443).

This was a matter of local law and the Federal Court was not at liberty to substitute its judgment for that of the State Court. Thus, in *Helvering* v. *Stuart*, 317 U. S. 154 (1942), at Page 161, the Court states, in an opinion by Mr. Justice Reed, applying the law of the State of Illinois:

> "The power to transfer or distribute assets of a trust is essentially a matter of local law. *Blair* v. *Commissioner*, 300 U. S. 5, 9; *Freuler* v. *Helvering*, 291 U. S. 35, 43-45."

The local law is correctly stated in the dissenting opinion of Judge Swan and cases (*supra*).

II.

The Circuit Court of Appeals, one member of the court dissenting, has decided a federal question, probably in conflict with applicable decisions of this Court.

The leading case construing the phrase "*in contemplation of death*", the verbiage of which is found in the applicable Regulation 80, Article XVI (printed in Appendix, infra), is *United States* v. *Wells*, 283 U. S. 102 (1931).

The following quotations from the opinion of this Court in the *Wells* case, *supra*, will suffice:

> "The question necessarily is as to the state of mind of the donor" (p. 117).
>
> * * * * *
>
> "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer * * *" (p. 118).
>
> * * * * *
>
> "If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos*, which spring from a different motive" (p. 118).

See, also:

> *Milliken* v. *United States*, 283 U. S. 15 (1931);
> *Heiner* v. *Donnan*, 285 U. S. 312 (1932);
> *Colorado National Bank, et al.* v. *Commissioner*, 305 U. S. 23 (1938).

As stated in the dissenting opinion of Judge Swan in this case:

> "The statutory language, as interpreted by the Treasury Regulations and by the opinions of the Supreme Court, clearly shows that the operative fact

which brings the section into play is 'the state of mind' or 'motive' of the donor at the time of the transfer." (R. 442).

In this case, the decedent, prior to the granting of the allowances, had been judicially declared to be incompetent by reason of insanity, and was therefore incapable of exercising or possessing any intent whatsoever.

Certainly, on the face of it the Statute does not cover this case. But the Circuit Court of Appeals construed the section to read: "any interest * * * of which at any time a transfer has been made *from* the decedent in contemplation of death" (R. 438) (Italics ours). This is nothing more or less than judicial legislation, since such a construction disregards the plain mandate of the Statute that not only must the "transfer" be *by the decedent*, but the "contemplation" must be that *of the decedent*. If Congress had intended to cover cases in which the "contemplation" might have been made by someone acting on behalf of the decedent, it would have used some other language.

Such a strained construction disregards decisions of this Court that a taxing act is not to be extended beyond its letter.

> *Crooks, Collector* v. *Harrelson*, 282 U. S. 55 (1930); *Gould* v. *Gould*, 245 U. S. 151 (1917).

Such a construction also disregards other decisions to the effect that the Estate Tax Law is not designed to reach all transfers (*Colorado National Bank, et al.* v. *Commissioner*, 305 U. S. 23) and is a part of a more comprehensive plan which includes the Gift Tax Law. The Estate Tax Law and the Gift Tax Law are in *pari materia* and their history and relationship to one another is clearly outlined in the opinion of Judge Swan in *Hesslein* v. *Hoey*, 91 F. (2d) 954; (certiorari denied, 302 U. S. 756). See, also, *Burnet* v. *Guggenheim*, 288 U. S. 280, 286; *Estate of Sanford* v. *Com-*

missioner, 308 U. S. 39, 42; *Rasquin* v. *Humphreys*, 308 U. S. 54.

In the *Sanford* case, supra, the opinion of the Court was by Mr. Justice Stone.

The Court say:

> "In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 et seq. of the Revenue Act of 1924, 43 Stat. 253, reenacted as Sec. 501 et seq. of the 1932 Act, 47 Stat. 169, imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws."

Some of the allowances now before this Court were subjected to gift tax in the case of *City Bank Farmers Trust Company* v. *Hoey*, 23 Fed. Supp. 831 (S. D. N. Y. 1938, aff'd 101 F. (2d) 9). In that case, no point was made that the allowances were not gifts and the sole question was whether the gifts had been completed prior to the effective date of the Federal Gift Tax Act (June 6, 1932). A donative intent is unnecessary to render a transfer subject to the Federal Gift Tax Law (Revenue Act of 1932, Sections 501, 503; *Commissioner* v. *Greene*, 119 F. (2d) 383 (C. C. A. 9th, 1941, certiorari denied 314 U. S. 641), which covers cases such as this. The decision of the Circuit Court of Appeals involves a distorted construction of Section 302 (c) of the Revenue Act, which finds no support in the history of this legislation or in the decisions of this Court (cases *supra*). Such a construction is wholly unnecessary to the Congressional purpose and is inconsistent with the comprehensive scheme embodied in the Estate Tax and Gift Tax Laws.

III.

The Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be, decided by this Court.

(1) The application of Section 302 (c) of the Revenue Act, under which these *allowances* have been taxed as gifts in contemplation of death, has been the subject of controversy in perhaps hundreds of cases. The question in most of them has been whether under the circumstances of the particular case a gift *inter vivos* has been designed to evade the payment of taxes or intended as a substitute for a testamentary disposition.

The research of counsel has discovered no cases similar to that at bar. *Farwell* v. *Commissioner*, 38 F. (2d) 791 (C. C. A. 2nd, 1930) bears a factual resemblance to the case at bar, but the opinion of the Court concludes with a statement that "no claim is made that the payments involved were gifts in contemplation of death". *City Bank Farmers Trust Company* v. *Hoey* (*supra*), involving these allowances and *Commissioner* v. *Greene* (*supra*) were both gift tax cases. The question presented in the case at bar has not been, but should be, decided by this Court.

The construction of Section 302 (c) of the Revenue Act of 1926 as having any application to an allowance out of the income of an insane person, who died intestate, made pursuant to Court order, is absurd for reasons inherent in the situation. The dominant purpose of the statute "is to reach substitutes for testamentary disposition and thus prevent the evasion of the estate tax".

United States v. *Wells*, 283 U. S. 102 (1931);
Milliken v. *United States*, 283 U. S. 15 (1931).

If the application of the Section is to be extended to cases of this character, the principle is of sufficient importance and so far reaching that it should be announced by this

Court. Otherwise, the decision of the Circuit Court of Appeals is likely to provoke confusion and difficulty in the administration of both the Federal Estate Tax and the Gift Tax Laws.

(2) In dealing with the allowances paid to the incompetent's daughter and grandchildren the court below apparently recognized that some sort of "testamentary purpose" must be found in order to bring the allowances within the reach of Section 302 (c) of the Revenue Act of 1926. This it purported to find in certain remarks of counsel during the allowance proceedings to the general effect that the daughter and grandchildren would take the incompetent's property on her death under the State intestacy laws (R. 441). The majority court below was squarely faced with a situation where there was no evidence in the record of any kind as to testamentary purpose with reference to the allowances directed to be paid to the brother and sisters of the incompetent. Nevertheless, the court stated as the basis of its decision as to this part of the case:

> "And yet it seems to us that it is enough to carry them along with the allowances to the daughter and grandchildren that the property transferred was beyond any power of the donor to enjoy, as were the remainders in The Astor Trust Cases; and that it was in addition beyond her individual power of disposition. . . . With less confidence as to these, we hold that they were also gifts 'in contemplation of death' within Sec. 302 (c)." (R. 441)

The decision therefore construes the Act as being applicable to any transfer of property where (a) the owner himself could not enjoy the property, and (b) where the owner himself could not dispose of the property. The necessary effect of this decision, if permitted to stand, would be to render taxable, as a transfer in contemplation of death, every allowance paid out of an insane person's surplus income, inasmuch as such allowances may only be ordered by the court where provision is first made for the insane person's own needs. Thus no surplus income so transferred

could ever be "enjoyed by the incompetent", and by hypothesis the incompetent could never himself dispose of it.

The necessary result of the decision, therefore is to hold that while sane persons may make transfers which are not taxable as gifts in contemplation of death, every transfer made out of the surplus income of an insane person is taxable as such. No language can be found in the statute nor any intent on the part of Congress enacting it which would support the conclusion that the estates of insane persons are to be discriminated against in any such fashion. Even if this were not true, the statute, as construed by the majority court below, would make such an arbitrary and capricious discrimination against estates of insane persons as a class as to render it violative of the due process clause of the Fifth Amendment of the Constitution of the United States.

Nichols v. *Coolidge*, 274 U. S. 531 (1927);
Hoeper v. *Tax Commission*, 284 U. S. 206 (1931);
Heiner v. *Donnan*, 285 U. S. 312 (1932);
Helvering v. *City Bank Co.*, 296 U. S. 85, 94 (1935).

What is there so contrary to all human experience in a donation by way of allowance from mother to child that it must be inferred as a matter of law that it has the character of a testamentary disposition? In the case of competent people, such transfers are made every day without challenge and the Gift Tax Law amply covers such transfers. The very word "allowance" imports life, not death.

CONCLUSION

Certiorari should be granted.

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Appendix

Revenue Act of 1926, Section 302 (c) as amended; now Section 811 (c) of Internal Revenue Code.

"SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

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(c) *Transfers in Contemplation of, or Taking effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * * * *"

Treasury Department Regulations 80 (approved Nov. 7, 1934):

"ART. 15. *Transfers during life.*—The following transfers made by the decedent during his life, by

trust or otherwise, other than bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers subsequent to the enactment of the Revenue Act of 1916 made in contemplation of death (see article 16); (2) transfers resulting from an arrangement, whether made before or after the enactment of the Revenue Act of 1916, if title was not to pass from the decedent to the beneficiary unless the latter survived the former, or title, having passed, was to be divested and the property returned to the decedent if the beneficiary predeceased him (see article 17); (3) transfers made after the enactment of the Revenue Act of 1916 in the case possession or enjoyment was retained by the decedent (see article 18 and the exception stated therein); (4) transfers in which the decedent retains, either alone or in conjunction with any person or persons, the right to designate who shall possess or enjoy the property or the income thereof, if made after the enactment of the Revenue Act of 1916 (see article 19 and the exceptions stated therein); and (5) transfers made before or after the enactment of the Revenue Act of 1916 in which the enjoyment of the transferred property was subject at decedent's death to any change through the exercise, either by decedent alone or with other person or persons, of a power to alter, amend, or revoke, or if after the enactment of the Revenue Act of 1916 such a power was relinquished by the decedent in contemplation of death (see articles 20 and 21).

The value of transferred property includible in the gross estate is the value at the date of decedent's death. If a portion only of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the gross estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at date of decedent's death, due to such additions or betterments, should not be included.

To constitute a bona fide sale for an adequate and full consideration in money or money's worth it must have been made in good faith, and the price must have been an adequate and full equivalent, and reducible to a money value. If the price was less than an adequate

and full equivalent only the excess of the fair market value of the property, as of the date of the decedent's death, over the price received by the decedent should be included in the gross estate. For the purposes of the estate tax a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

In the case a transfer, by trust or otherwise, was made by a written instrument, duplicate copies thereof should be filed with the return. If of public record, one of the copies should be certified; if not of record, one copy should be verified. If the decedent was a nonresident, only one copy, certified or verified, need be filed.

All transfers made by the decedent during his life of an amount of $5,000 or more, except bona fide sales for an adequate and full consideration in money or money's worth, must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not. If the executor believes that such a transfer is not subject to the tax a brief statement of the pertinent facts should be made.

ART 16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

A transfer in contemplation of death is a disposition of property prompted by the thought of death. The phrase "contemplation of death" as used in the statute is not limited to contemplation of imminent death or to an apprehension that death is near at hand. Death must be "contemplated," that is, the motive which induces the transfer must be such that leads to testamentary disposition. A gift inter vivos which springs from a motive essentially associated with life rather than with death is not made in contemplation of death.

As the phrase "transfer in contemplation of death" is applicable to many varying transactions, the circumstances of each case must be examined to ascertain the motive which induced the decedent to make the transfer. If the transfer results from mixed motives, one of which is the thought of death, the more compelling motive controls. A condition of the mind or body of the transferor (whether occasioned by old age or disease) which naturally prompts a testamentary disposition to a proper object of his bounty, will be considered a decisive test of contemplation of death in the absence of proof of the existence of purposes associated with life as the dominant motive for the transfer.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death. This provision applies even though the decedent died subsequent to the effective date of the Revenue Act of 1926 and prior to the effective date of the Revenue Act of 1932. (The conclusive presumption of contemplation of death as described in the second sentence of section 302(c) has been held to be void by the Supreme Court of the United States.)

If the executor contends that the value of a transfer of $5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

The fact that a gift was made as an advancement to be taken into account upon the final distribution of the decedent's estate is not, in and of itself, determinative of its taxability.

New York Civil Practice Act, Secs. 1356, 1357, 1382, 1383.

"SEC. 1356. *Jurisdiction of supreme court; concurrent jurisdiction of county court.* The jurisdiction of the supreme court extends to the custody of the person and the care of the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this article, is exclusive of that of the others with respect to any matter within its jurisdiction for which provision is made in this article."

"SEC. 1357. *Duty of court having jurisdiction.* The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts and for the safe keeping and maintenance, and the education, when required, of the incompetent person and his family."

"SEC. 1382. *Restoration of property.* Where a person with respect to whom a committee is appointed, as prescribed in this article, becomes competent to manage himself or his affairs, the court must make an order discharging the committee of his property, or the committee of his person, or both, as the case requires, and requiring the former committee to restore to him the property remaining in the committee's hands. Thereupon the property must be restored accordingly."

"SEC. 1383. *Death of incompetent; duty of Committee.* Where a person, of whose property a committee has been appointed, as prescribed in this article, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of as if a committee had not been appointed. The committee, in such case, shall render to the court by which he was appointed a final account of his proceedings touching the property of the

incompetent. Notice of the application for settlement of such account shall be given, in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. (Am'd by L. 1935, ch. 724, in effect Sept. 1.)."